COPY

DEC 6 1973

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-888

CHARLES E. SELLERS, JR., and
CHARLES SEXTON,

Petitioners,

versus

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Calvin M. Whitesell
Counsel For Petitioners
820 Executive Building
P. O. Box 1226
Montgomery, Alabama 36102

TABLE OF CONTENTS

	Page
The Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	
I. THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS HAS CREATED A NEW AND NOVEL APPROACH FOR FINDING PROBABLE CAUSE FOR THE ISSUANCE OF SEARCH WARRANTS, AND IN DOING SO HAS MISCONSTRUED AND MISAPPLIED THE HOLDINGS OF DRAPER V. UNITED STATES, 358 U.S. 307 (1959) AND UNITED STATES V. ACARINO, 408 F. 2d 512 (2D CIR. 1969), CERT. DENIED, 395 U.S. 961 (1969)	5
II. THE AFFIDAVIT BEFORE THIS COURT IS INSUFFICIENT TO SUSTAIN A FINDING OF PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT	11
III. THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT IS INSUFFICIENT BECAUSE IT FAILS TO INFORM THE MAGISTRATE IF THE INFORMER'S INFORMATION IS FRESH OR REMOTE	16
Conclusion	17

TABLE OF CONTENTS (Continued)

Page

Appendix 1a

A. Opinion of the Court Below 1a

B. Order of the Court Below Denying Petition For Rehearing 21a

C. Stay of Judgment 22a

D. Fourth Amendment, United States Constitution 23a

E. Pertinent Text of Title 18 U. S. C. Section 1254(1) 24a

TABLE OF AUTHORITIES

SUPREME COURT CITATIONS:

Aguilar v. Texas, 378 U.S. 108 (1964) 2, 5, 10, 11, 12, 14, 15, 17

Byars v. United States, 273 U.S. 28 (1926) 10

Draper v. United States, 358 U.S. 307 (1959) 5, 8, 9

Jones v. United States, 362 U.S. 257 (1960) 2, 14

McCray v. Illinois, 386 U.S. 300 (1967) 9

Spinelli v. United States, 393 U.S. 410 (1967) 2, 10, 11, 12, 14, 17

United States v. Harris, 403 U.S. 573 (1971) 2, 11, 13, 14

United States v. Ventresca, 380 U.S. 102 (1965) 17

TABLE OF AUTHORITIES (Continued)

Page

FEDERAL CITATIONS:

Bailey v. United States, 386 F. 2d 1 (5th Cir. 1967), cert. denied, 392 U.S. 946 (1968) 9

Rogers v. United States, 442 F. 2d 902 (5th Cir. 1971) 9

Rosencranz v. United States, 356 F. 2d 310 (1st Cir. 1969) 17

Thompson v. White, 406 F. 2d 1176 (5th Cir. 1969) 9

United States v. Acarino, 408 F. 2d 512 (2d Cir. 1969), cert. denied, 395 U.S. 961 (1969) 5, 8, 10

United States v. Black, 476 F. 2d 267 (5th Cir. 1973) 11, 12

United States v. Boyd, 422 F. 2d 791 (6th Cir. 1970) .. 16

United States v. Bridges, 419 F. 2d 963 (8th Cir. 1969) 16

United States v. Crawford, 462 F. 2d 597 (9th Cir. 1972), cert. denied, 409 U.S. 915 (1972) 15

United States ex rel. Cunningham v. Fallette, 397 F. 2d 143 (2d Cir. 1968), cert. denied, 393 U.S. 1058 (1968) 9

United States v. Flanagan, 423 F. 2d 745 (5th Cir. 1970) 16

United States v. Fuller, 441 F. 2d 755 (4th Cir. 1971), cert. denied, 404 U.S. 830 (1971) 16, 17

United States v. Holliday, 474 F. 2d 320 (10th Cir. 1973) 17

TABLE OF AUTHORITIES (Continued)

Page

United States v. McNally, 473 F. 2d 934 (3rd Cir. 1973) 11

United States v. Melancon, 462 F. 2d 82 (5th Cir. 1972), cert. denied, 409 U.S. 1038 (1972) 16

United States v. Morris, 477 F. 2d 657 (5th Cir. 1973) 16

United States v. Newsome, 434 F. 2d 1024 (5th Cir. 1970) 9

United States v. Roth, 391 F. 2d 507 (7th Cir. 1970) .. 15

United States v. Sellers, et al, No. 72-3733 (5th Cir. July 26, 1973) 5, 15, 18

United States v. Squella — Abendans, 447 F. 2d 575 (5th Cir. 1971), cert. denied, 404 U.S. 985 (1971) 8, 10

Wesson v. United States, 172 F. 2d 931 (8th Cir. 1949) 15

OTHERS:

Fourth Amendment, United States Constitution 11

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

CHARLES E. SELLERS, JR.,
and CHARLES SEXTON,
Petitioners,

versus

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for The Fifth Circuit entered in the above entitled case on July 26, 1973, petition for rehearing denied on November 7, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It confirmed the conviction of the Petitioners for violating 18 U. S. C. Section 1084(a); and is set forth as Appendix A, p. 1a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 26, 1973, petition for rehearing denied on November 7, 1973. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Can a magistrate determine probable cause to issue a search warrant from an affidavit which sets out none of the underlying circumstances of the informer's information as required by *Aguilar v. Texas*, 378 U.S. 108 (1964); which is void of independent corroboration as required by *Spinelli v. United States*, 393 U.S. 410 (1967), and where the affiant possesses no prior knowledge of the suspects alleged criminal activities to color an allegation of suspicious activity as required by *United States v. Harris*, 403 U.S. 573 (1971).

2. Is the United States Fifth Circuit Court of Appeals stating a new basis for determining probable cause by holding that a search warrant can issue based on an affidavit which only contains the informer's conclusions and an allegation of the informer's dramatic reliability.

3. Can a magistrate make a correct constitutional determination of probable cause from information which is not shown to be fresh as opposed to remote.

4. Can allegations which are insufficient under the first prong of the test set out in *Aguilar v. Texas*, 378

U.S. 108 (1964) be cured by an allegation of an informer's dramatic reliability.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States.

The statute involved is Title 18 U. S. C. Section 1084(a).

Because these provisions are lengthy, their pertinent text is set forth as Appendixes D and E at pages 23a-24a.

STATEMENT OF THE CASE

The Petitioners were convicted in the United States District Court for the Middle District of Alabama, Northern Division, of using a wire communication facility for the transmission in interstate of wagering information in violation of 18 U. S. C. Section 1084(a).

A sentence of three years imprisonment was imposed.

The convictions of the Petitioners are based entirely on evidence seized in a raid on the residence of Petitioner Sellers. The constitutionality of the search and seizure conducted during the raid was the subject of a rather lengthy hearing on the Petitioners' Motion to Suppress. Inasmuch as the Petitioners only request

that this Court determine the constitutionality of the search and seizure, the Petitioners will limit the statement of facts to those produced at the suppression hearing, and those adduced at the trial which will aid this Court.

Mr. W. B. Painter, Intelligence Officer, Alabama Department of Public Safety, prepared the affidavit for the search warrant with the Honorable Glen Curlee, the District Attorney of the Nineteenth Judicial Circuit. Mr. Painter (the affiant) executed the affidavit before Honorable Edwin Sanford, Judge of the Law and Juvenile Court of Elmore County, Alabama.

Mr. Painter testified at the suppression hearing that the affidavit before this Court is the affidavit that he signed. He testified over the objection of defense counsel that the allegations of the informer's reliability are correct, that the phone numbers are those of Petitioner Sellers, and that all the information was supplied by agent Graffagnini of the Federal Bureau of Investigation.

Agent Graffagnini testifed that he had participated in many investigations into illicit gambling activities, that he provided Mr. W. B. Painter with the information contained in the affidavit, that he had given reliable information to Mr. Painter as stated in the affidavit and that he gave Mr. Painter the phone numbers of Petitioner Sellers after he had investigated and verified the toll calls.

The remaining facts elicited at the suppression hearing relate to matters raised before the Court of Appeals but not in this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

I

The United States Fifth Circuit Court Of Appeals Has Created A New And Novel Approach For Finding Probable Cause For The Issuance Of Search Warrants, And In Doing So Has Misconstrued And Misapplied The Holdings Of Draper v. United States, 358 U.S. 307 (1959) And United States v. Acarino, 408 F. 2d 512 (2d. Cir. 1969), Cert. Denied, 395 U.S. 961 (1969).

The Court of Appeals held that an informer's information given in detail but not conforming to the requirement that it reveal the informer's source as dictated by *Aguilar v. Texas*, 378 U.S. 108 (1964), coupled with the affiant's allegation of dramatic informer reliability, is a sufficient basis for a magistrate to infer probable cause. *United States v. Sellers, et al*, No. 72-3733, pp. 4-7 (5th Cir., July 26, 1973).

The affidavit on which the Court of Appeals based this decision is as follows:

AFFIDAVIT FOR SEARCH WARRANT

STATE OF ALABAMA)
) SS.
COUNTY OF ELMORE)

Willie B. Painter, affiant, being first duly sworn on oath, deposes and says:

(1) That the following property constitutes evidence of criminal conduct: In that the herein described automobiles and real property contains records and other evidence of transactions whereby money or other valuable things may be won or lost upon prize fights, ball games, or other contests or book-making or pool-selling, contrary to Title 14, Sections 261 and 278, Code of Alabama 1940, as amended.

(2) Affiant further says that the above-mentioned property is located at the following described place: 243 Murphy Drive, a residence located in the Scenic Hills section, a residential area located in the Southwest section of Elmore County, Alabama, being the residence of Charles E. Sellers.

One 1971 Pontiac Grand Prix two door sedan, VIN 2765718171502, bearing 1972 Alabama License plate number 29-9109, issued to Charles E. Sellers, Route 5, Prattville, Alabama.

One 1968 Chrysler 300, two door sedan, VIN 3M23K86-C201138, being 1972 Alabama License plate number

29-9110, issued to Charles E. Sellers, Route 5, Prattville, Alabama.

(3) Affiant further says that he has probable cause to believe the above-listed property to be searched for and seized is now located upon said described premises, based upon the following facts: Information is that Charles Sellers is operating book from his residence located 243 Murphy Drive, Prattville, Alabama. He has two telephones listed from this residence as follows: #365-6461 and #365-8657. Information REFLECTS THAT #365-8657 is apparently used for the bookmaking operation.

Toll calls have been made from this number to telephone number 853-1252 in Birmingham frequently during recent months. Telephone number 853-1252 is in the name of Michael Canon, 1120 B. Florentine Circle, Birmingham, Alabama. This number is an unlisted number. Canon also has telephone service through #853-8751 and Canon is a known gambler.

Telephone number 322-6928 has been called frequently from Charles Sellers residence number. This number is in the name of Anthony Ippolito at 2646 Milner Court, Birmingham, Alabama. Ippolito also has #324-7195. Frequent calls have been made from telephone number 365-8657 to telephone number 853-8751 in Birmingham.

Information is that Canon and Ippolito are furnishing the line to Charles Sellers on basketball games at the present and on football and baseball games during

the season. Sellers in turn furnishes the line to local bookmakers in the Montgomery area. Canon and Ippolito reportedly are handling layoffs for Charles Sellers.

The above information was supplied by an informant who has given reliable information in more than one hundred instances in matters of investigation.

(End of Affidavit)

Inasmuch as no authority was cited in reaching this conclusion, the Petitioners searched diligently to uncover the court's rationale. The Petitioners submit to the Court that the decision below possibly can find comfort in *United States v. Squella — Abendans*, 447 F. 2d 575 (5th Cir. 1971), cert, denied, 404 U.S. 985 (1971).

The Court said there has developed a three-tiered method of analysis for testing whether *Aguilar's* requirement had been met at page 580 of *Squella — Abendans*, as follows:

> 1. When the information provided is in such "'detail'" and "'minute particularity'" that "'a magistrate, when confronted with such detail could reasonably infer that the informant had gained his information in a reliable way,'" then the report, if sufficiently incriminating, may without more, be grounds for finding probable cause. Citing Draper v. United States, 358 U.S. 307 (1958); United States v. Acarino, 408 F. 2d 512 (2d Cir. 1969).

2. When the information is from a reliable source but in less detail than in test No. 1, but contains other allegations of independent investigation which makes it apparent that the informer has not fabricated his tip from whole cloth. Citing Draper, supra; Jones v. United States, 362 U.S. 257 (1960) Rogers v. United States, 442 F. 2d 902 (5th Cir. 1971); Thompson v. White, 406 F. 2d 1176 (5th Cir. 1969); and Bailey v. United States, 386 F. 2d 1 (5th Cir. 1967).

3. When the information is not sufficient under tests No. 1 and 2, it may count toward probable cause, but only as one of a number of factors of further support, viz., a law enforcement officer's knowledge of independent facts which suggests criminal conduct. Citing McCray v. Illinois, 386 U.S. 300 (1967); United States v. Newsome, 434 F. 2d. 1024 (5th Cir. 1970); and United States ex rel. Cunningham v. Fallette, 397 F. 2d 143 (2nd Cir. 1968).

The holding in the case before this Court apparently combines test No. 1 plus informer reliability.

The Court will remember that in *Draper* the specific facts of the informer's tip were verified by the narcotics agents prior to the arrest of the suspect. Thus it cannot be suggested that this Court's holding in *Draper* was based solely on the mere premise that the informer's information was detailed.

A reading of *United States v. Acarino, supra,* reveals not only the fact that federal narcotics agents received an informant's tip, but a plethora of independent facts which corroborated the tip, viz., (1) the suspect was seen meeting a known drug peddler and receiving a sum of money from him, (2) the suspect frequented various bars known to be used by narcotics traffickers, (3) the suspect was seen unlawfully changing auto tags on his auto, (4) immediately prior to the arrest the suspect drove in an evasive manner, (5) when the suspect's auto was stopped the agents saw him move his hand which contained a small shiny object toward a partially open window, (furtive movement), and (6) the informant told the agent that he personally knew that the suspect was delivering narcotics on the night of his arrest. The court said that the detailed nature of the information given plus the fact that the informant said he personally knew the delivery was to be made satisfied the *Draper — Aguilar — Spinelli* test. Surely, however, the Second Circuit Court of Appeals is not to be understood as saying that the corroborative facts outlined above did not weigh in its decision.

In both *Squella — Abendans* and *Acarino* the informant's information was verified prior to arrest, in the case before the Court the only verification of the informer's tip was the fruit of the raid. A search which is illegally prosecuted is not made lawful by what it brings to light. *Byars v. United States,* 273 U.S. 28 (1926).

Although it may be correct that this Court's opinions in *Aguilar* and *Spinelli v. United States,* 393 U.S. 410

(1969), have been slightly diluted by subsequent decisions, *United States v. Harris*, 403 U.S. 573 (1971); *United States v. McNally*, 473 F. 2d 934, 938 (3rd Cir. 1973), a most conservative reading of *Aguilar* and *Spinelli* does not remotely suggest that an affidavit which is framed in vague, conclusory terms, which contains no allegation of freshness, and which is not supported by facts independent of the affidavit which in some manner corroborates the allegations contained therein, will form an adequate basis for determining probable cause.

To allow the decision of the Court of Appeals to stand will not assume a dilution of *Aguilar* and *Spinelli*, but rather a presumption that they never existed.

II

The Affidavit Before This Court Is Insufficient To Sustain A Finding Of Probable Cause To Support The Issuance Of A Search Warrant.

In order that a search warrant may pass Fourth Amendment muster the issuing magistrate must be informed of some of the underlying circumstances on which the informant's conclusions were based and also some of the circumstances which led the affiant to decide that the informant was reliable. *Aguilar v. Texas, supra; United States v. Black*, 476 F. 2d 267 (5th Cir. 1973). If the *Aguilar* test is not met, but the informant's tip is corroborated by independent sources the magistrate may issue the warrant if the tip and independent corroborative sources taken together re-

sult in information equally as trustworthy as that attainable by strict adherence to the *Aguilar* standard. *United States v. Black, supra,* at 269. Also, when an informer's tip is a necessary element in the finding of probable cause, its proper weight must be determined by a more precise analysis as opposed to considering the totality of the circumstances. *Spinelli v. United States, supra,* at 415.

The informer's tip plus the allegations of reliability are the only ingredients in the affidavit before this Court.

The Petitioners submit that the affidavit is insufficient in that it clearly fails to show the underlying circumstances from which the informant concluded that the Petitioners were conducting a bookmaking operation.

The affidavit of instant concern contains numerous conclusive allegations but what is the basis of these allegations? No where in the affidavit is there any statement detailing the manner in which the information was gathered. Judge Sanford was not told how Mr. Painter received his information — it is not alleged that the informant personally observed Sellers or Sexton at work or that he ever placed a bet with them. The affidavit merely states that "information is," et cetera. This is insufficient under *Aguilar* and *Spinelli.*

The affidavit states that Sellers has two telephones. This only reflects innocent seeming activity. *Spinelli, supra.*

The affidavit alleges that "information is" that Canon and Ippolito are furnishing lines on basketball games. However, this allegation also suffers from the same uncertainty as "Charles Sellers is operating book." How did the informant discern this information, upon what underlying facts is this allegation based? This could be nothing "more substantial than a casual rumor circulating in the underworld or on accusation based merely on an individual's general reputation." *Spinelli*, at page 416.

Likewise, there is no basis for the assertion that Sellers furnishes the line to local bookmakers.

The Petitioners are not unmindful of the principles set out in *United States v. Harris, supra*, but compare the affidavit in *Harris* to the affidavit in this case. There are no personal observations by the affiant or any allegations of independent investigation to support this affidavit. There are no admissions against interest. There is no allegation in the instant case that a bet has recently been placed with Sellers or Sexton, that they have recently called the numbers listed in the affidavit or that they have recently furnished the line to local bookmakers. Indeed what is there in the affidavit to show that the affiant's "present information is truthful or reliable?" *Harris, supra*, at page 682.

Apparently the affiant attempted to bolster the affidavit by alleging that Canon and Ippolito are known gamblers. *Harris* does not hold that a bald assertion that Canon is a known gamber lends support to the

affidavit. It is where prior events within the affiant's knowledge supply facts that certain people are known gamblers that the affidavit is given weight. *Harris, supra,* at pages 581-583. There are no allegations of events within the affiant's own knowledge to show that Sellers, Sexton, Canon or Ippolito are known gamblers.

The affidavit in the instant case cannot pass any test singularly set out in *Aguilar, Spinelli* or *Harris.* Neither can the affidavit pass the collective test when all three cases are construed together. Further, the government can find no comfort in *Jones v. United States,* 362 U.S. 257 (1960), for there again the affidavit was related to personal observations of the informant and involved admissions against interest.

It is impossibe to apply the *Spinelli* test and uphold the affidavit because there is no independent corroboration to support any part of the informer's tip, and it certainly is not sufficient to pass *Aguilar's* test without independent corroboration. The *Harris* test also contemplates some personal observation of the affiant.

The informer is Carmelo Graffagnini, a special agent of the Federal Bureau of Investigation, who is alleged to have given reliable information in more than one hundred instances in matters of investigation. With regard to the credibility of the informer, the lower court said at page 6, as follows:

> "In cases where the affidavit presents such cogent assertions of reliability the quantum of underlying circumstances which reveal the source of the informer's knowledge necessary to sustain the affidavit is clearly less than in cases where the indicia of informer reliability is less dramatic."

The Petitioners have no quarrel with the principle that the two prongs of the *Aguilar* test are to be construed together and not separately. *United States v. Crawford,* 462 F. 2d 597 (9th Cir. 1972), cert. denied, 409 U.S. 915 (1972); *United States v. Roth,* 391 F. 2d 507, 511 n. 5 (7th Cir. 1967). However, the Petitioners submit that the Court below allowed the alleged credibility of the informer to displace rather than support *United States v. Crawford, supra.*

The Petitioners submit that the court below established a new rule of law in holding that the magistrate could infer probable cause from the unsupported conclusions of an informer. *United States v. Sellers, et al.,* at page 6. See *Wesson v. United States,* 172 F. 2d 931, 936 (8th Cir. 1949), ("no inference of fact or law is reliable when drawn from premises which are uncertain").

It is clear that the court was presuaded by the fact of the informer's alleged credibility, yet, at the suppression hearing the informer could allow nothing more than he supplied the phone numbers. On the other hand the defense attorneys sparingly questioned the informer because: (1) probable cause is to be deter-

mined from the affidavit and cannot be bolstered at a hearing on a motion to suppress, and (2) at the time there was no clear indication from the Fifth Circuit of the action to be taken by the trial court in the event the truthfulness of the allegations of affidavit were successfully attacked — now, however, it is clear that the evidence is to be suppressed in the event that the allegations are false, *United States v. Morris*, 477 F. 2d 657, 662 (5th Cir. 1973).

The affidavit before this Court is almost identical to a portion of an affidavit which was held insufficient by the Court of Appeals for the Fourth Circuit in *United States v. Fuller*, 441 F. 2d 755 (4th Cir. 1971), cert. denied, 404 U.S. 830 (1971). *Fuller* was quoted with approval by the court below in *United States v. Melancon*, 462 F. 2d 82 (5th Cir. 1972), cert. denied. 409 U.S. 1038 (1972), and should have been followed. See also *United States v. Bridges*, 419 F. 2d 963 (8th Cir. 1969); *United States v. Flanagan*, 423 F. 2d 745 (5th Cir. 1970).

III

The Affidavit In Support Of The Search Warrant Is Insufficient Because It Fails To Inform The Magistrate If The Informer's Information Is Fresh Or Remote.

When an affidavit is phrased in the present tense the date of the informer's information must be alleged so that the magistrate may make an independent determination of whether an offense is currently taking place, *United States v. Boyd*, 422 F. 2d 719 (6th Cir.

1970); *Rosencranz v. United States*, 356 F. 2d 310 (1st Cir. 1966); unless the undated information is factually interrelated with other, dated information, *United States v. Holliday*, 474 F. 2d 320 (10th Cir. 1973).

The affidavit contains no date confirming the freshness of the informer's information and there is no interrelation with dated information. The Court of Appeals did not write to this point as it apparently feels that it is part and parcel of the underlying circumstances prong of the *Aguilar* requirement, and thus being so, the freshness of the information is presumed because of the indicia of dramatic informer reliability. Nevertheless, there is no precedent upon which the appeals court can arrive at this result — indeed, all precedent is contrary to this position.

CONCLUSION

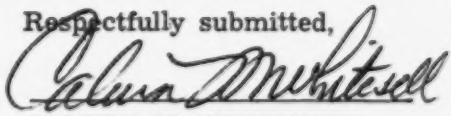
The Petitioners do not insist that the affidavit be examined with an eye for technical requirements of elaborate specificity, *United States v. Ventresca*, 380 U.S. 102 (1965); but submit that the court below should have applied a more precise analysis as required by *Spinelli* and *United States v. Fuller, supra.*

The Petitioners submit that the decision of the court below nullifies this Court's holdings in *Aguilar* and *Spinelli*, and that certiorari should be granted to determine if *Aguilar* and *Spinelli* will allow the opinion of the Fifth Circuit to stand.

The court below realizes that the case before this Court "is both a unique and close one." *United States v. Sellers, et al, supra,* at 6. Accordingly, the court developed a unique and novel approach on which to uphold the affidavit. The court's approach is not founded in precedent or logic.

The source of the informer's information has never shown, however, it is interesting to note that on December 1, 1972, one day after the suppression hearing, agents of the Federal Bureau of Investigation secured authorization to tap the phones of certain individuals in Birmingham, Alabama, and as an apparent result of the phone taps, Mr. Canon and Mr. Ippolito were indicated and have pled guilty to violations of the federal laws. This information was not known to the Petitioners until August or September of this year.

Respectfully submitted,



CALVIN M. WHITESELL
Counsel For Petitioners

CERTIFICATE OF SERVICE

As a member of the Bar of the Supreme Court of the United States, I hereby certify that pursuant to Rule 33 of the Rules of the Supreme Court of the United States, I have served copies of the foregoing Petition For Certiorari on the following:

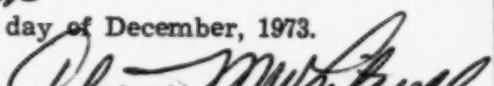
Solicitor General
Department of Justice
Washington, D. C. 20530

Honorable Ira DeMent
United States Attorney
Middle District of Alabama
United States Post Office Building
Montgomery, Alabama 36104

Honorable Joseph D. Phelps
Counsel for Petitioner, Charles H. Carr
P. O. Box 612
Montgomery, Alabama 36101

I respectfully request that this Court enter my appearance as counsel for the Petitioners, Charles E. Sellers, Jr. and Charles Sexton.

DONE this the 5th day of December, 1973.



CALVIN M. WHITESELL
Counsel for Petitioners

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3733

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES E. SELLERS, JR., CHARLES SEXTON and CHARLES H. CARR,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Alabama

---

(July 26, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

CLARK, Circuit Judge: Sellers, Sexton and Carr appeal from their convictions for the use of a wire communication facility for the transmission in interstate commerce of wagering information in violation of 18 U.S.C. § 1084(a). We find no merit in any of

the contentions raised on this appeal and therefore affirm the convictions.

Validity of the Search Warrant

The Unidentified Informer's Tip — The appellants first urge that the warrant authorizing the search of the premises on which the gambling operations were conducted did not comply with the standards set out in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and further explicated in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) These cases hold that an affidavit based solely upon an unidentified informer's tip may provide the probable cause basis for the issuance of a search warrant if the affidavit contains sufficient objective assertions from which a detached magistrate may reasonably conclude that the hearsay should be credited. In these rulings the Supreme Court established a two-prong test for assaying affiants' hearsay statement: (1) the affidavit must present sufficient objective evidence to enable the magistrate to conclude that the unnamed informant is credible or that his information is reliable, and (2) the affidavit must set forth some underlying circumstances which reveal the source of the informer's information pertaining to the criminal activity.

The appellants here do not challenge the sufficiency of the instant affidavit[1] to meet prong (1) — the re-

---

[1] AFFIDAVIT FOR SEARCH WARRANT

STATE OF ALABAMA)
) SS.
COUNTY OF ELMORE)

Willie B. Painter, affiant, being first duly sworn on oath, deposes and says:

(1) That the following property constitutes evidence of criminal conduct: In that the herein described automobiles and real property contains records and other evidence of transactions whereby money or other valuable things may be won or lost upon prize fights, ball games, or other contests or book-making or pool-selling, contrary to Title 14, Sections 261 and 278, Code of Alabama 1940, as amended.

(2) Affiant further says that the above-mentioned property is located at the following described place: 243 Murphy Drive, a residence located in the Scenic Hills section, a residential area located in the Southwest section of Elmore County, Alabama, being the residence of Charles E. Sellers.

One 1971 Pontiac Grand Prix two door sedan, VIN 2765718171502, bearing 1972 Alabama License plate number 29-9109, issued to Charles E. Sellers, Route 5, Prattville, Alabama.

One 1968 Chrysler 300, two door sedan, VIN 3M23K86C201138, being 1972 Alabama License plate number 29-9110, issued to Charles E. Sellers, Route 5, Prattville, Alabama.

(3) Affiant further says that he has probable cause to believe the above-listed property to be searched for and seized is now located upon said described premises, based upon the following facts: Information is that Charles Sellers is operating book from his residence located at 243 Murphy Drive, Prattville, Alabama. He has two telephones listed from this residence as follows: #365-6461 and #365-8657. Information REFLECTS THAT #365-8657 is apparently used for the bookmaking operation.

Toll calls have been made from this number to telephone number 853-1252 in Birmingham frequently during recent months. Telephone number 853-1252 is in the name of Michael Canon, 1120 B. Florentine Circle, Birmingham, Alabama. This number is an unlisted number. Canon also has telephone service through #853-8751 and Canon is a known gambler.

Telephone number 322-6928 has been called frequently from Charles Sellers residence number. This

liability of the unidentified informer. Rather, they contend that the affidavit in this case fails to satisfy prong (2) — the requirement that the warrant disclose the underlying circumstances from which the informant drew his conclusion of criminal activity so as to enable independent magisterial evaluation.

The face of the affidavit in the case at bar does not expressly state any source for the informer's information. The government, however, contends that a reading of the entire affidavit discloses sufficient detail to satisfy the alternative prong (2) standard enunciated in *Spinelli* because the affidavit describes the criminal activity "in sufficient detail that the magistrate may know he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli*, 393 U.S. at 416, 89 S.Ct. at 589.

Though appellants quarrel somewhat with the *Spinelli* premise that a sufficiently detailed affidavit may

---

number is in the name of Anthony Ippolito at 2646 Milner Court, Birmingham, Alabama. Ippolito also has #324-7195. Frequent calls have been made from telephone number 365-8657 to telephone number 853-8751 in Birmingham.

Information is that Canon and Ippolito are furnishing the line to Charles Sellers on basketball games at the present and on football and baseball games during the season. Sellers in turn furnishes the line to local bookmakers in the Montgomery area. Canon and Ippolito reportedly are handling layoffs for Charles Sellers.

The above information was supplied by an informant who has given reliable information in more than one hundred instances in matters of investigation.

support the inference that the informant gained his information in a reliable way, their principal argument is that the affidavit in this case does not meet that standard. They contend that the affidavit here is little more detailed than the one found defective in *Spinelli* and that the objective facts set out do not support the requisite inference. We disagree. As did the affiant in *Spinelli,* the affiant here, Mr. Painter, asserted that two telephones were located on the premises to be searched and that an informer who had proven to be exceptionally reliable had stated that the suspects were operating a gambling enterprise. Unlike the affiant in *Spinelli,* however, Mr. Painter did not content himself with a mere conclusory statement that the defendants were conducting a gambling operation. Instead, he went on to outline the administrative hierarchy of the bookmaking operation to the magistrate by swearing that he had been told that two of the individuals furnished "the line" to and "handled layoffs" for the third, and that the third individual disseminated "the line" locally. These detailed statements relating to the organizational procedures of the gambling operation provided a basis from which a detached judicial officer could reasonably infer that the informant must have had specific and direct knowledge of this particular bookmaking operation. In addition, Mr. Painter disclosed to the magistrate that he was advised that two telephones were maintained at each of two other specified addresses and that frequent long distance toll calls were made between all three addresses. He also stated that the telephone service at one of the addresses was in the name of Michael Canon, and opined that Canon was a known gambler. A magistrate

could have reasonably inferred from his wealth of detail as to the inter-use of these telephones that the information was the product of the informer's personal knowledge or that the informer had access to and had examined telephone survey records.

Moreover, common sense impells the conclusion that when a confidential informer is shown to be unusually reliable, the magistrate may place added credibility in such information in the affidavit as reveals the precise source of informer's knowledge. The affidavit before us here recites that the informant had furnished reliable information on more than one hundred occasions.[2] In cases where the affidavit presents such cogent assertions of reliability the quantum of underlying circumstances which reveal the source of the informer's knowledge necessary to sustain the affidavit is clearly less than in cases where the indicia of informer reliability is less dramatic. In sum, either of the two objective standards from which the magistrate is to judge the worth of the hearsay may support, although it may not displace, the other. *See United States v. Crawford*, 462 F.2d 597 (9th Cir. 1972); *cf. United States v. Roth*, 391 F.2d 507, 511 n.5 (7th Cir. 1967). While the instant case is both a unique and close one, on these facts we hold that the face of the affidavit properly permitted the magistrate to infer that sufficient probable cause was shown to justify the issuance of a search warrant.

---

[2]As it turns out, the unnamed informant was a Special Agent of the Federal Bureau of Investigation.

> It is not the intent of the *Aguilar* and *Spinelli* decisions to make it difficult for a policeman to get a warrant if in fact he has probable cause. On the contrary, the cases contemplate that an affiant with some basic understanding of the law can get a warrant if he has probable cause and simply sits down and explains why. Accordingly, we have evaluated the warrants in this case not under technical requirements but against the benchmark cases that the Supreme Court has indicated we should use. In doing so, we have construed the preference for searches under warrants to imply that the benchmark cases are concerned with practical inferences that may be taken from the facts as a whole.

Gonzales v. Beto, 425 F.2d 963, 970 (5th Cir. 1970) (footnote omitted).

State Search Warrants and Federal Rule 41 — Relying on this court's recent opinion in *United States v. Brouillette*, ____ F.2d ____ (5th Cir. 1973) __No. 72-2456, May 15, 1973], which held that a warrant may be issued by a United States Commissioner to federal officers only upon a showing of probable cause to believe that a federal crime has been committed, the appellants mount a second, more technical, attack on the state court search warrant. They contend that the fruits of the search, conducted under authority of the warrant issued by an Alabama judge on a probable cause showing of a breach of Alabama law, but not federal law, are not admissible in a federal prosecution. This some-

what startling contention is based on the premise that the federal involvement in this particular search made it equivalent to a federal search and thus subjected it to the technical requirements of Rule 41 of the Federal Rules of Criminal Procedure,[3] including the

---

[3]At the time of the issuance of the warrant the relevant portion of Rule 41 read as follows:

RULE 41.
SEARCH AND SEIZURE

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. § 957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the

Brouillette requirement that the warrant only issue upon a showing sufficient to establish probable cause to believe a *federal crime* has been committed.

Despite the government's contention that the fact is otherwise, we assume for the purpose of this decision that there was sufficient federal involvement to require that the search be treated as a federal search.[4] At the same time we note that there is no suggestion that the state participation in the search was not a bona fide effort to secure evidence of a violation of state law for use in a state prosecution.

In *Navarro v. United States*, 400 F.2d 315 (5th Cir. 1968) (hereinafter *Navarro I*),[5] this court held that the

---

property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

[4]The proof discloses that the informant was an active federal official and that this informant and one other such official accompanied state officers to the premises and participated in certain phases of the search process. After a successful state prosecution based upon the evidence disclosed by the search, the instant federal charges were filed.

[5]In United States v. Navarro, 429 F.2d 928 (5th Cir. 1970), however, this court held that the use in a subsequent state court prosecution of the physical evidence discovered by the state officers during the joint search should not be enjoined, though the federal officers were not allowed to testify as to the fruits of their search. Finally, in United States v. Navarro, 441 F.2d 409 (5th Cir. 1971), we held that an officer who was a state agent at the time of the search could testify as to the fruits of the search at the state trial despite the fact that he had subsequently accepted employment by the federal government.

fruits of a search conducted jointly by federal and state officers pursuant to a state warrant were improperly admitted into evidence in a federal prosecution since the warrant was not issued by a "court of record" as then required by Rule 41.[6] The question presented here, where the search was conducted by federal and state officers under the authority of a warrant issued by a state court on the affidavit of a state officer which avered that evidence of a state crime might be found, is whether *Navarro I* requires the suppression of the fruits of that search in a federal prosecution because the warrant was not secured through procedures which complied in all respects with the requirements of Rule 41.

Properly read, Rule 41 grants the authority to designated judicial officers, federal and state, to issue federal search warrants. The authority granted to state courts under this rule is *in addition* to the state-vested power of those courts to issue a warrant upon a showing that probable cause exists to believe a violation of state law has occurred. While Rule 41 sets out the procedure to be followed in issuing a warrant for a violation of federal law, it obviously should not be contemplated that the federal rule would purport to regulate the procedures through which state courts may issue search warrants predicated on violations of state law.

---

[6]The 1972 amendments to Rule 41, effective October 1, 1972, omit the court of record requirement.

A federal court reviewing the sufficiency of a warrant issued by a state court, for the purpose of determining whether the fruits of a resulting search are lawful and hence admissible in a federal prosecution, must determine whether the warrant was issued as a federal warrant or as a state warrant. If the warrant was issued under authority of Rule 41 as a federal warrant clearly it must comply with the requirements of the rule. If, however, the warrant was issued under authority of state law then every requirement of Rule 41 is not a *sine qua non* to federal court use of the fruits of a search predicated on the warrant, even though federal officials participated in its procuration or execution. The products of a search conducted under the authority of a validly issued state warrant are lawfully obtained for federal prosecutorial purposes if that warrant satisfies constitutional requirements and does not contravene any Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers.

Navarro I established that the "court of record" requirement of Rule 41 was a substantive standard by which the conduct of federal searches should be measured rather than any mere procedural standard. Our holding today must not be construed as a retreat from the principle of that case. It is, rather, a refusal to extend *Navarro I* beyond the limits of common sense.

The requirement of Rule 41 (before it was amended) that warrants be issued only by "courts of record" apparently reflected an intent that federal searches were not to be conducted on the authority of search warrants issued by state tribunals whose functions are

so limited that they have not been made courts of record.[7] *Navarro I* accomplished this purpose, through the use of this court's supervisory power, by excluding from federal prosecutions the fruits of searches conducted with federal officers participation.

No such useful purpose could be served, however, by a declaration that state warrants must be issued only to investigate federal crimes if federal officers may be present when the search is conducted. In a case where sufficient evidence of any federal crime is lacking, as it was apparently lacking in the case *sub judice*, cooperating officials would be completely unable to comply with such a rule. The fault which the appellants urge us to declare could not be avoided by procuring the warrant from another court.[8] The only effect of such a requirement on the conduct of federal officers would be to preclude federal cooperation and participation in any warranted search conducted by state officers for state purposes. We decline to hold that such an anomalous and baseless rule was ever intended by Rule 41. *Navarro I* certainly intended no such result. To the contrary, it stated:

> We do not mean to suggest in any way that we would discourage cooperation between federal and state law enforcement officers.

400 F.2d at 319.[9]

---

[7] See *Navarro I, supra*, 400 F.2d at 318 n.2.

[8] Compare *Navarro I.*

[9] *Brouillette* also recognized the necessity of federal-state co-adjuvancy.

> After all, under the system of federalism, there is

The proper test to be applied is whether a particular Rule 41 standard is one designed to assure reasonableness on the part of federal officers, or whether the provision merely blueprints the procedure for issuance of federal warrants. The case *sub judice* presents a paradigm of the latter class of requirements. The federal crime essential of *Brouillette* is a recognition of the inherent limits of the authority granted by Rule 41 to federal and state magistrates to issue federal search warrants. It does not exist to limit the activities of federal officers when they cooperate with state officers. We decline to apply this particular Rule 41 requirement to state warrants. The contention that the fruits of this joint federal and state search should be suppressed is without merit.

Moreover, we specifically decline to adopt any rule under our supervisory power that would require that state court warrants meet all of the Rule 41 procedural requirements whenever federal officers have sufficient evidence of federal law violations to obtain a federal warrant.[10] Such a rule would not only serve no useful purpose, but it would also place officers acting jointly on the horns of a dilemma in deciding whether to charge a state or federal crime. Such officials should be free to make a considered choice based on the best

---

room for dual state-federal activity. Federal officials often refer information they have received to state officials for possible prosecution.

____ F.2d at ____ [slip op. at 10].

[10]Though some of the testimony in this case indicates that the federal officers suspected a violation of federal law, we are unable to determine from the record before us whether the officers had sufficient evidence to have secured a federal warrant.

available information and unencumbered by merely-technical procedural rules.

"Transmission" under the Statute

Appellant Carr, conceding for the sake of argument that the evidence established that wagers were received by telephone from out-of-state betters, nevertheless contends that the government failed to establish a violation of 18 U.S.C. §1084 (a)." He bases this argument on his contention that "transmission" as used in that provision does not embrace the act of receiving. For this proposition he cites *United States v. Stonehouse*, 452 F.2d 455 (7th Cir. 1971), and *Telephone News Systems, Inc. v. Illinois Bell Telephone Co.*, 220 F.Supp. 621 (N.D. Ill. 1963) (three judge court) (dicta), *aff'd per curiam*, 376 U.S. 782, 84 S.Ct. 1134, 12 L.Ed.2d 83 (1964), both of which lend some support to his contention. In *Sagansky v. United States*, 358 F.2d 195, *cert. denied*, 385 U.S. 816, 87 S.Ct. 36, 17 L.Ed.2d 55 (1966), however the First Circuit reached a contrary result.

While this might be a proper construction of the term "transmission" taken out of context,

---

[1]Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

> § 1084(a) does not punish the mere transmission of bets or wagers, but rather the "use" of interstate wire communication facilities for their transmission. When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of the statute to hold that he has "used" the facility for the transmission of bets or wagers.

358 F.2d at 200. The First Circuit's interpretation has recently found favor in the Tenth Circuit, which gave the statute a similar reading in *United States v. Tomeo*, 459 F.2d 445, *cert. denied*, ____ U.S. ____, 93 S.Ct. 232, ____ L.Ed.2d ____ (1972).

> In reaching this conclusion we give consideration ... to the fact that the telephone is designed for a two-way conversation and exchange of information. If we were to accept the appellant's contention, we would effectively deny that any discussion or exchange took place, and we find that assumption rather strained. We also note that an interpretation of use of the wire facility which is limited to the isolated *sending* of messages does not meet the basic purpose of the statute and renders its scope more limited than an everyday experience with the telephone would dictate. The statute deals with bookmakers — persons "en-

> gaged in the business of betting or wagering." Bookies *take* bets, they receive them, they handle them; it is a transaction requiring mutuality or a meeting of minds. It is unlikely in framing section 1084(a) that Congress considered betting transactions to move in but one direction in the use of the telephone.

459 F.2d at 447. Aligning ourselves with the views of the First and Tenth Circuits, we conclude that the statute properly construed reaches the activities of these professional gamblers who, as the jury found, conducted their activities through the use of interstate telephone facilities, regardless of which party sent and which received the wager.

Sufficiency of the Evidence as to Carr

Next, Carr contends that, even if the evidence was sufficient to support a jury finding of his involvement in an intrastate gambling operation, the government failed to show that he personally knew of the interstate character of the enterprise. The contention is not well taken.

The proof in this case was overwhelming that telephone calls were received from an out-of-state bettor. Moreover, if the statute requires actual knowledge of the non-local origin of such telephone transmissions,[12] it is clear that at least one or more of the participants in the enterprise knew that calls were received from

---

[12] *Compare* United States v. Swank, 441 F.2d 264 (9th Cir. 1971).

Koscuisko, Mississippi. It was not necessary that the Government prove that Carr had actual intent to violate federal law, in light of the more-than-sufficient proof that he aided and abetted the state law violation.

> There must exist a community of unlawful intent between the accessory and the perpetrator of the crime, but "* * * an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him." 22 C.J.S., Criminal Law, § 92, p. 164.

Russell v. United States, 222 F.2d 197, 199 (5th Cir. 1955); *McClanahan v. United States,* 230 F.2d 919, 924 (5th Cir.), *cert. denied,* 352 U.S. 824, 77 S.Ct. 33, 1 L.Ed.2d 47 (1956). *See also United States v. DeLaMotte,* 434 F.2d 289 (2d Cir. 1970), *cert. denied,* 401 U.S. 921, 91 S.Ct. 910, 27 L.Ed.2d 825 (1971).

Carr's reliance on *Grimes v. United States,* 379 F.2d 19 L.Ed. 113 (1967), is misplaced. In that case the aiding and abetting conviction was reversed, not for lack interstate, but expressly because the proof did not show Grimes had counselled or assisted that activity. Reading that case with this court's opinion in *Russell* and *McClanahan,* as we must, it is apparent that the interstate activity proven in *Grimes* was implicitly held not to be a natural or probable result of Grimes' participation in the illegal local gambling operation. In the case at hand, Carr is bound to have known that

it was most natural and highly probable that an operation of this magnitude would receive at least one interstate call.

The Unabridged and Unexpurgated Tapes

Finally, the appellants urge reversal on the ground that during its deliberations the jury was improperly permitted to listen to certain recorded tapes, only portions of which had been admitted into evidence. After determining that at least some members of the jury had listened to substantial portions of the tapes which were not properly before them, the trial judge denied the appellant's motion for a mistrial, finding that appellants had suffered no prejudice and that the error, if any, was the fault of appellants' trial counsel.

The trial judge, through the bailiff, specifically advised the attorneys for each of the defendants and the Government that it was their responsibility to review the exhibits that had been placed in the hands of the clerk for the purpose of seeing that no exhibits not admitted into evidence went to the jury. Though appellants apparently recognize that ordinarily a failure of counsel to comply with such an order would provide them with no basis for objection, *see Dallago v. United States*, 427 F.2d 546, 554 (D.C. Cir. 1969), and *United States v. Strassman*, 241 F.2d 784, 786 (2nd Cir. 1957), they argue on this appeal that they were misled by the statements of the Government attorney. As the transcript of the trial court's inquiry into this question reveals, one of the attorneys for the appellants stated to the Government attorney that he was concerned

about the tapes going to the jury room. The Government attorney responded that although the entire tape had been placed in the recorder, it was set so that the portion of tape that had been admitted into evidence would play when the machine was turned on. The counsel for the appellants acquiesed in this procedure, and the tapes were sent to the jury. Some one and a half hours later and before any further word had been received from the jury the defendants' attorney, apparently regretting after reflection his initial decision to furnish the tapes to the jury in this manner, brought the matter to the attention of the court. The court stated that he would inquire of the jury when they returned a verdict as to whether they had listened to any unadmitted portions of the tapes.

We need not reach or decide whether the Government's representations were so misleading as to free the defendants of the consequences of their lawyer's choice, because we determine that no prejudice resulted from the jury's exposure to the unadmitted portions of the tapes. Sellers and Sexton did not contest the fact that they operated a bookmaking enterprise, while the evidence as to Carr's participation was overwhelming. The only really contradicted issue at trial was whether the appellants used the telephone in interstate commerce. In its order denying the motions for a new trial, the district court stated:

> This court has very carefully listened to the tape recordings in question and finds that, in addition to some "family talk" and singing and pop music, there is general talk by unidentified

men regarding betting, the recording of sports scores from short-wave radio, the giving of betting lines on basketball games, and a discussion by two unidentified men in which Charles Carr's name is mentioned with reference to a land transaction in Crenshaw County, Alabama. Thus, this court specifically finds that none of the defendants were prejudiced to any degree by the tape recordings in question going to the jury.

After listening to these two tapes, we can reach no other conclusion except that any error was harmless beyond a reasonable doubt. *See Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 284 (1969); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[13]

We have considered the other issues raised by the appellants and find them without merit. The convictions appealed from are

AFFIRMED.

---

[13]In light of this holding that any error was harmless, we need voice no opinion as to whether, when a motion to retrieve the tapes had been properly presented, the trial judge would have committed error if he had not taken immediate action to retrieve the tapes. It is possible that such action would have prevented what ultimately transpired in the jury room; on the other hand, it might well have only emphasized to the jury that certain evidence, probably unfavorable to the defendants, was being withdrawn from their consideration. No contemporaneous recording was made of the colloquy between counsel and the trial judge as to this matter. However, it appears that defense counsel acquiesced in the trial court's suggestion that no action be taken pending the jury verdict.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3733

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES E. SELLERS, JR., CHARLES SEXTON and CHARLES H. CARR,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Alabama

---

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC
(Opinion July 26, 1973, 5 Cir., 1973, ____ F.2d ____).

(November 7, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested

that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3733

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES E. SELLERS, JR., and
CHARLES SEXTON, CHARLES H. CARR,
Defendants-Appellants.

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including December 7, 1973, the stay to continue in force until the final disposition of the

case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ CHARLES CLARK
UNITED STATES CIRCUIT JUDGE

APPENDIX "D"

AMENDMENT IV — SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX "E"

SECTION 1084. TRANSMISSION OF WAGERING INFORMATION; PENALTIES

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.